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IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL RODAK, JR., CLERK
STATES

October Term, 1977

No. 77-1233

STEVE KENT ODNEAL and
JOHN LOUIS RIBANDO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Appellee.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

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PETITION FOR WRIT OF CERTIORARI
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Opinion Below

Petitioners, Steve Kent Odneal and John Louis Ribando, hereby apply for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment rendered by said court in the above entitled cause. The opinion of the Court of Appeals herein is appended hereto and designated as Appendix "A" to this petition.

Jurisdiction

The judgment of the Court of Appeals in the instant matter was entered December 5, 1977. A petition for rehearing was thereafter filed by petitioners, and the same was denied by order of the Court of Appeals filed February 6, 1978. A copy of said order is appended hereto and designated as Appendix "B" to this petition. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code, § 1254(1).

Nature of Case

The instant case concerns a charge of possession of marijuana with intent to distribute the same, a violation of Title 21, United States Code, § 841(a)(1). The contraband was seized aboard a private sailing vessel after the boat was detained and boarded by United States Coast Guard personnel, accompanied by a United States Customs Agent, in domestic waters. The constitutional propriety of the detention, boarding, and evidence seizure under the Fourth Amendment poses the issue before this Court.

Question Presented

The basic question raised by these proceedings is whether the authority of the Coast Guard to stop, detain, and board private vessels sailing in domestic waters is constitutionally circumscribed. The question is of considerable significance to American citizens in this age of marinas and boating where private boat use in ocean waters is approximating if not exceeding automobile use at the time Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), was decided. A hearing in this matter should be granted to determine whether parallel restrictions on stopping, detaining, and searching vehicles and boats should be imposed. More succinctly framed, the issue is whether boat owners operating out of local marinas have a reasonable expectation of privacy respecting their vessels which may not be infringed without constitutional limitation.

Decision By Supreme Court

A decision by this Court on the issue raised is presently necessary as a guide to both the Coast Guard and the lower federal courts in future cases as well as to enlighten the boating public of their rights and obligations. Particularly is this so because of a potential conflict between circuits, with the Fifth Circuit adopting the position that Coast Guard boarding rights are unrestricted and the Ninth Circuit avoiding affirmation of this position. (See, footnote 2, page 6, Appendix "A".) The matter is thus one of recurrent character, which presents a continuing problem requiring definitive resolution.

Factual Summary

On June 2, 1976 the United States Coast Guard Cutter Point Camden, commanded by Lieutenant Junior Grade Keith Coddington, was on patrol anchored at Santa Cruz Island. Aboard was United States Customs Agent Vernon Elkins in addition to the crew of the Point Camden.

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Intelligence received prior to June 2nd indicated the area was used for illegal drug activity. Two such reported incidents were known to Coddington. (Rep. Tr. pp. 13-15, 24, 61.)

About 9:00 that morning a 50 foot, two masted, white sailing boat with four people aboard was sighted. Coddington decided to follow the boat "to determine its registration." The boat was sailing north, and after catching up to it the Point Camden followed it for about 30 to 45 minutes. During this time Coddington observed that both the mizzen (rear sail) and jib (front sail) were loose and flapping back and forth, the mizzen boom was untied and swinging with the sail, and the mizzen lines were loose and dragging in the water. The swinging of the mizzen boom was "possibly" dangerous because it could strike someone who might stand next to it. (Rep. Tr. pp. 15-20.)

Coddington also noticed the boat to be undocumented, a form of registration where the name and home port of the boat are attached to the stern. This was unusual because in Coddington's experience boats

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over 30 feet were normally documented. However, the boat did bear "CF" numbers on small plaques attached to the bow, which was another form of boat registration. A check of these numbers was made through the El Paso Intelligence Center to determine if the craft was stolen, and a negative ("no-hit") response was received. (Rep. Tr. pp. 20-21.)

Coddington further noted the four people aboard the boat to be dressed "raggedly," in dungarees and T-shirts, which he believed not the "normal attire" for a 50 foot yacht. In addition, none of these people acknowledged the presence of the Point Camden, which, too, Coddington thought was unusual since in his experience it was "normal for most individuals" to acknowledge the presence of the Coast Guard. Based on these circumstances, plus the loose rigging which indicated inexperienced personnel aboard, the fact the boat was a very expensive one, and the "CF" registration rather than documentation, Coddington formed the opinion that the boat "was possibly stolen." (Rep. Tr. pp. 21-23.)

A boarding of the boat was authorized by Coddington "for the purpose of checking their registration and the safety inspection." The boarding party consisted of Bosum Mate First Class Dusch, Quarter-master Second Class Hall, and Customs Agent Elkins. Coddington was later informed that illegal drugs were found on the boat and that the boat was also cited for having no registration papers or bell aboard. (Rep. Tr. pp. 23-24.)

The sailboat, before boarding, had been proceeding north through the Anacapa Passage. Boats so proceeding "possibly" are entering into United States waters from international waters. Coddington, however, couldn't specifically state whether he had ever seen a boat at that location coming from international waters. The boat at the time of boarding was about six miles off Santa Cruz Island. (Rep. Tr. pp. 25-26.)

No one on board the boat had signaled for help prior to the boarding; and Coddington was aware of a regulation, CFR 173.27, which permitted temporary numbers to be painted or attached to a boat for

demonstration or testing purposes. (Rep. Tr. p. 27.)

Agent Elkins was on board the Point Camden to assist in "law enforcement," which was the purpose of the cutter's surveillance in the area. (Rep. Tr. pp. 29-30.)

According to Coddington, international waters were those outside 12 miles of United States territory, including islands. Coddington, however, did not know whether the water way between Santa Cruz Island and the mainland was international waters, but the area of his surveillance was treated as domestic waters because he was operating within 12 miles of land. (Rep. Tr. pp. 33-34.)

In his pre-boarding check on the sailboat, Coddington ascertained that the identification numbers on the boat were registered to a dealer. He was also familiar with the practice of dealers putting their numbers on their boats during delivery. (Rep. Tr. pp. 39-40, 35.)

The boarding party was armed with "45's," and one crew member who remained

on the Point Camden was issued an M-16. According to Coddington this was "normal procedure" when making a "safety check" during "routine law enforcement patrol." There was no indication concerning criminal activity at the time other than that Coddington "thought it possibly was a stolen boat." (Rep. Tr. pp. 40-41, 53.)

John Dusch was the Executive Petty Officer of the Point Camden on June 2nd. In his opinion the sailboat sighted that morning was "sloppily rigged." The loose mizzen boom was dangerous because it could strike someone as it swung about, and the trailing mizzen lines were dangerous because they could get caught in the motor screw and affect the boat's control. He also believed it unusual for a boat that size to be undocumented, and he noticed that the people aboard the boat did not acknowledge the cutter's presence at any time. (Rep. Tr. pp. 103-108.)

Dusch was a member of the party authorized by Coddington to board the sailboat. The boarding purpose was for a "routine safety inspection and registration check,"

and this was announced to those on the sailing boat during the boarding. The boarding party used a small boat carried aboard the Point Camden to transfer to the sailboat. On reaching the main deck of the sailboat, Dusch was able to smell the odor of marijuana, which he was familiar with from prior experience as a law enforcement officer. (Rep. Tr. pp. 109-110.)

After boarding the sailboat, Dusch inquired as to the operator of the boat. Defendant Challman responded that he was, and Dusch asked for identification and the boat's registration papers. Challman replied that there was no registration aboard and that they were ferrying the boat from Newport to San Francisco for the owner. Challman further stated he had no identification and then said he thought he had some identification below and would get it. Challman started down a hatch, and Dusch followed him. About half way down Challman told Dusch he couldn't come below because Dusch had no authority to do so. Dusch responded that he did under Title 14, § 89 (United States Code). During this time, while on the

ladder, Dusch detected the marijuana odor to be stronger. At this point Agent Elkins called Challman out of the hatch and instructed Dusch to go below to find the identification. (Rep. Tr. pp. 130-132.)

Dusch proceeded down the hatch and observed a chart table at the bottom of the ladder. He turned toward the table to look for identification and at that time observed four brown burlap bags in the passage area adjacent to the main cabin. He then returned on deck where they examined defendant Bennett, who was sitting to the rear of the boat, and found him to be uncoordinated and incoherent as if under the influence of something. (Rep. Tr. pp. 132-134, 143-145.)

The boarding party was issued .45 automatic pistols by Dusch, and the operator of the transfer boat was issued a 12-gauge riot shotgun. This was not the "normal procedure" on a "safety check," but at that time the Point Camden was on a "law enforcement patrol" and boarding parties on such patrol were

required to be armed. According to Dusch, the Coast Guard did not make "normal routine patrols" in the area in question but rather made patrols specifically for law enforcement purposes, seeking out cases of criminal conduct, and on these patrols it was not unusual to be accompanied by a Customs agent. (Rep. Tr. pp. 138-140.)

Dusch did not participate in the discussion concerning boarding the sailboat. (Cl. Tr. p. 137.) He was, however, told by Coddington to check the boat's registration because Coddington "thought the boat might be stolen." He was not instructed by Coddington to search for drugs on the boat, and no indication was made to him as to any suspicion that there might be drugs aboard. (Rep. Tr. pp. 146-147.)

Vernon Elkins, a United States Customs Agent, was aboard the Point Camden on patrol off the Channel Islands the morning of June 2, 1976. He was aware through official channels that this area was the location of previous illegal activities involving contraband and had heard of

two specific instances concerning substantial marijuana seizures there. About 9:00 he observed a sailboat heading north through the Anacapa Passage. In briefings he had been informed that this was a frequently used route by contraband smugglers and that boats in this passage had not always cleared customs. (Rep. Tr. pp. 60-63.)

Elkins noticed a 50 gallon gas container on the sailboat. That, plus the time of morning (9:00) and the direction of travel (south to north) indicated to Elkins that the boat "was coming from a long journey;" and he "felt that it was a strong possibility that it had come from international waters." (Rep. Tr. pp. 65-66.)

Elkins also noticed that the boat was only moving about eight knots per hour although running under both power and sail and thought this to be unusual. He further observed the boat to be riding low in the water. And he had been briefed on the Channel Islands area being used in contraband smuggling activities. However, notwithstanding all of the foregoing observations and briefing information, Elkins

"did not at the time entertain thoughts that perhaps the vessel contained illegal drugs." He only thought that "it possibly came from international waters." (Rep. Tr. pp. 66-67.)

Elkins was part of the party which boarded the sailboat. As they pulled along side the sailboat, in the transfer dinghy, he detected a strong odor of marijuana. After going aboard the boat he was able to see down from the deck where he was standing into the main salon and observed three or four large burlap bags spewing out into the main salon. He could also detect the odor of marijuana while on deck. The gunny sacks he observed resembled types of marijuana packaging he was familiar with. (Rep. Tr. pp. 67-69.)

Initial interview of the people on the boat was conducted by the Coast Guard personnel in the boarding party and concerned their identification. At first they all stated they had none, and then Challman indicated he had identification below. Challman started down a ladder followed by Dusch and Elkins. He then

stopped and told them they couldn't go below. At this point Elkins "instructed Mr. Challman to step back and join his friends and to sit down, and [Elkins] instructed Mr. Dusch to go down and check things out." Subsequently, Dusch called Elkins to go down, at which time Elkins inspected the sacks and observed what appeared to be marijuana contained in them. (Rep. Tr. pp. 69-72.)

Elkins was aboard the Point Camden as part of his assignment to look for vessels entering from international waters which may not have cleared customs. In this connection, if he observed a boat he wanted to inspect, the Coast Guard personnel were supposed to cooperate with him. (Rep. Tr. pp. 81-82.) When he sent Dusch below, he directed him "to check out the area" and "to make a general search." (Rep. Tr. pp. 86-87.)

Prior to boarding the sailboat, Elkins had discussed with Coddington whether to stop the boat or not. They both agreed on their "observations," Coddington expressing a "professional opinion about the sails" and Elkins and "opinion on the way the boat was riding low." (Rep. Tr. p. 91.)

The foregoing constituted the evidence pertinent to the issue presented herein and forms the basis for the discussion below.

Petitioners' Position

Petitioners maintain that the personnel of the Coast Guard Cutter Point Camden unlawfully stopped, detained, and boarded petitioners' vessel and that Customs Agent Elkins likewise was unauthorized to board the boat. Accordingly, the ensuing seizure of evidence was tainted and the same should be suppressed.

Discussion

The principal concern of this case relates to the authority of the Coast Guard to detain and board private boats in domestic waters. According to Commander Coddington, the area of his operations in the instant case was deemed by him to be domestic waters. (Rep. Tr. pp. 33-34.)

Two bases are offered to support the Coast Guard action here. The first is

Title 14, United States Code, § 89, the second § 2 of the same Title.

Section 89 accords Coast Guard officers broad rights to board, inspect, and search vessels in United States waters (and United States vessels on the high seas), but only for the "prevention, detection, and suppression of violations of laws of the United States." The inquiry directed to this statute thus is whether the statute extends to the Coast Guard a carte blanche right to board, inspect, and search any such vessel to see if perhaps there might be a violation of law being committed (the position of the Fifth Circuit), or whether the right is limited by an appropriate constitutional standard of "founded suspicion" or "probable cause" to believe a crime is being committed. The statute itself is silent in this regard.

However, as this Court, in Almeida-Sanchez v. United States, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973), pointedly observed: "No Act of Congress can authorize a violation of the Constitution." The Fourth Amendment

proscribes unreasonable searches and seizures, which this Court has extended to include the stopping and detention of vehicles (Carroll v. United States, supra) and individuals (Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Logically and reasonably the Amendment and its extension must encompass vessels as well.

To hold otherwise would contravene the doctrine enunciated by this Court in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Clearly, boat owners reasonably entertain an expectation of privacy respecting their property, in the same manner as other property owners, and it cannot be said that they relinquish their privacy merely because they choose to take a pleasure or fishing trip outside their local marina.

In such a situation the Coast Guard's authority under § 89 must be deemed constitutionally limited. The Carroll doctrine, as this Court stated in Almeida-Sanchez, "does not declare a field day for the police in searching automobiles.

Automobile or no automobile, there must be probable cause for the search." 413 U.S. at p. 269, 93 S.Ct. at pp. 2537-2538. A definitive determination to the same effect must now be declared respecting private boats in domestic waters.

No specific finding of probable cause to believe the vessel in this case was either stolen or engaged in illegal activity was made by the trial court or the Court of Appeals. (See Appendix "A" page 5, lines 13-25.) Absent such determination, a remand of the case for further findings under appropriate instructions is required.

Section 2 of Title 14 requires similar constitutional circumscription as § 89. Essentially § 2 authorizes the Coast Guard to "promulgate and enforce regulations for the promotion of safety of life and property on the high seas and waters subject to the jurisdiction of the United States." However, the detention and boarding of vessels in such enforcement is not specifically provided for by the statute and unlimited action in this respect is unwarranted. Nor would it be consistent with Fourth Amendment protections.

The instant case provides a prime example of the need for constitutional limitation on the application of § 2, Title 14. Assuming the observations of the Point Camden's officers indicated certain safety hazards in connection with the operation of petitioners' vessel, was detention and boarding necessary to remedy the problem? Indeed, if safety were truly a factor in the matter, what justification was there to follow the boat for 30 to 45 minutes without apprising those aboard of the "dangers" of the "loose mizzen boom and trailing lines?" Moreover, correction of these defects could readily have been accomplished simply by verbal communication. The more intrusive invasion of privacy entailed in a detention and boarding far exceeded the scope of the problem presented.

Section 2 thus may not be the basis for Coast Guard action such as occurred in this case without infringing on the Fourth Amendment unless enforcement of maritime regulations cannot otherwise be reasonably effectuated. It would serve no useful purpose to limit § 89 by

constitutional standards if the Coast Guard could justify a detention and boarding at any time to effect a "safety and registration" check. Standards of reasonableness must similarly be declared as to § 2 to give the Fourth Amendment full application to private vessels in domestic waters. Such declaration has not previously been made and is called for at this time.

Again, no findings were made below on the reasonableness of the instant detention and boarding within the scope of Fourth Amendment standards as applied to Title 14, § 2. Remand under appropriate instructions is thus required for such findings to be made.

Both as to § 89 and § 2, the essential deficiency in this case is that no constitutional limitation was imposed on the authority of the Coast Guard to act under these statutes. The matter was treated as if the Coast Guard could detain and board vessels without restriction so long as the action were termed a safety or registration check or to detect violations of law. This Court must now declare such

a concept to be erroneous and set a clear precedent for the future. Application of §§ 2 and 89 of Title 14 of the United States Code should unequivocally be held to be subject to the Fourth Amendment in the same manner as any other enactment of Congress, and the Coast Guard, in its law enforcement duties, be deemed subject to the standards of reasonableness imposed on all other officers of the law.

One last point of law requires brief mention: the authority of agent Elkins to board petitioners' vessel. Contrary to the Court of Appeals opinion (Appendix "A" page 6, lines 2-5), Elkins testified that he "did not at the time entertain thoughts that perhaps the vessel contained illegal drugs." Rather, respecting the boat, he thought only that "it possibly came from international waters." (Rep. Tr. pp. 66-67.) However, under the "functional equivalence" theory of border searches, there must exist a "reasonable certainty," a standard higher even than that of "probable cause," to believe the vessel or vehicle to be searched has crossed the border or entered territorial waters.

United States v. Tilton,

534 F.2d 1363 (C.A. 9, 1976);

United States v. Solmes,

527 F.2d 1370 (C.A. 9, 1975);

Almeida-Sanchez v. United States,

supra.

Even the Court of Appeals rejected the border search concept in the instant case. (See Appendix "A" page 5, lines 5-12.) Accordingly, the authority to detain and board petitioners' vessel finds no support in agent Elkins' presence or involvement.

Conclusion

The critical issue in this case is the authority of the Coast Guard to detain and board private boats in domestic waters. It is a problem of increasing significance because of the enhanced affluence of our society which fosters ever increasing marina construction and boating activity. A rule based on the Carroll doctrine requires application to this situation. The boating enthusiast and the yachtsman yield no right of privacy by sailing outside the marina, no

more so than the motorist driving on public streets. The Fourth Amendment must be declared equally applicable in both circumstances and Title 14, § 2 and § 89 be held subject thereto.

Application

It is respectfully requested, on the basis of the arguments presented and the authorities cited hereinabove, that the within petition for writ of certiorari be granted and the matter set for hearing on this Honorable Court's docket.

Respectfully submitted,
HOWARD E. BECKLER
Attorney for Petitioners

Appendix "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 76-3537

STEVE KENT ODNEAL,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 76-3752

JOHN LOUIS RIBANDO,
GEORGE M. CHALLMAN III,
and HAROLD LOUIS BENNETT,
Defendants-Appellants.

F I L E D
DEC 5 1977

EMIL E. MELFI, JR.
Clerk, U.S. COURT
OF APPEALS

Appeal from the United States
District Court for the Central
District of California

Before: CHAMBERS and HUFSTEDLER, Circuit
Judges, and WONG,* District Judge.

* Honorable Dick Yin Wong, United States
District Judge, District of Hawaii,
sitting by designation.

A-1.

HUFSTEDLER, Circuit Judge:

Appellants were convicted for possessing with intent to distribute two tons of marihuana in violation of 21 U.S.C. § 841(a)(1). The issue is whether the district court erred in denying appellants' motion to suppress the marihuana found aboard a yacht by members of the Coast Guard and by a customs officer. We hold that detention of the yacht was justified and that probable cause emerging from the detention supported the subsequent search and seizure.

On the morning of June 2, 1976, the United States Coast Guard Cutter Point Camden was anchored in Smuggler's Cove off Santa Cruz Island, one of the Channel Islands located about 16 miles off the Southern California coastline. The Point Camden was under the command of Lieutenant Junior Grade Coddington. In addition to regular Coast Guard personnel, Customs Patrol Officer Elkins was aboard to assist the Coast Guard in the performance of its law enforcement duties. Coddington and Elkins had information that Smuggler's Cove and the Anacapa Passageway area was a site for an increasing amount of

smuggling. About 9:00 a.m. on June 2, 1976, cutter personnel saw a 51-foot, 2-masted sailing sloop traveling in a northerly direction through Anacapa Passageway. The cutter pursued the vessel to ascertain its registration. The cutter caught up with the vessel and thereafter trailed it for about 30 to 35 minutes. During the surveillance period, Coddington noticed that the sloop was rigged for heavy weather, although the sea was calm and the weather was clear. The vessel was equipped with a mizzen and a jib sail; both sails were hoisted, but neither was holding wind. Both sails were free to flop back and forth. The lines from these sails were dragging in the water and the mizzen boom was unsecured and swaying back and forth. The halyard lines were dragging in the water. The condition of the lines and the sails was dangerous. Some of the cutter's officers noted that the sloop was not documented, *i.e.*, the yacht had no name or home port attached to its stern. Normally, any vessel over 30 feet long is documented. The vessel did have registration numbers ("CF numbers") on small

plaques attached to the bow pulpit.

Coddington ran a check on the CF numbers with the El Paso Intelligence Center and learned that the numbers were registered to a dealer. Coddington was familiar with the dealer practice of affixing temporary numbers to a boat which was being either sold or test run, but he had never personally observed boats using temporary licensing identification of this kind.

The four passengers aboard the yacht did not acknowledge the Coast Guard's presence, even when the cutter came within 50 yards. The normal practice, under these circumstances, is that personnel aboard the yacht will acknowledge the Coast Guard's presence and signal that all is well aboard.

In addition to the heavy weather rigging, Elkins observed that the yacht was riding low in the water and Coddington told Elkins that it was unusual for a sailboat to be traveling at a rate of speed of only eight knots when it was running under both power and sail at the same time. Elkins also saw a 50-gallon

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rubber gas tank on the deck of the sailboat. Both Elkins and Coddington observed the raggle-taggle crew and the poor rigging of the yacht. Elkins and Coddington discussed their observations while both of them were on the bridge of the cutter.

Elkins testified that he concluded from these observations that there was a strong possibility that this vessel was coming from international waters. Coddington suspected that the sailboat was stolen and authorized a boarding party to board her. The purpose of the boarding was to inspect the registration papers and to conduct a safety inspection. Coddington accordingly authorized Bosum Dusch, another hand, and Elkins to board the craft.

The armed boarding party transferred from the cutter in a 14-foot Boston Whaler. As the Whaler pulled alongside the sailboat before boarding, Elkins detected a strong odor of marihuana coming from the yacht.

If the brief detention of the vessel necessary to permit the boarding was

A-5.

justifiable, the ultimate search and seizure, which revealed the marihuana, were not in violation of the requirements of the Fourth Amendment because probable cause developed before the vessel was either boarded or searched. Two questions are therefore posed: (1) Was the Coast Guard, under the circumstances, justified in detaining the vessel preparatory to boarding her, and (2) was the customs officer justified in participating in the detention?

The Coast Guard is granted very broad statutory authority to enforce and to assist in the enforcement of all applicable federal laws upon the high seas and waters subject to the jurisdiction of the United States. (14 U.S.C. § 2.) In connection with its law enforcement activities, the Coast Guard is given statutory authority to board vessels and to make "searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violation of laws of the United States." (14 U.S.C. § 89(a).) In addition, the Coast Guard is given authority to enforce

regulations for the promotion of safety of life and property on the high seas and waters within the United States' jurisdiction. (14 U.S.C. § 2.)

All of the activities of the Coast Guard fell well within the statutory authority granted. However, as the Government acknowledges, the Coast Guard's authority must be subject to the limitations imposed by the Fourth Amendment, because no act of Congress can authorize a violation of the Constitution. (E.g.,

Almeida-Sanchez v. United States (1973) 413 U.S. 266.) For the purposes of this case, it is necessary only to determine whether the detention of the vessel, preparatory to boarding was justified by the application of appropriate Fourth Amendment criteria, because the smell of marihuana was detected before the vessel was actually boarded and that fact supplied probable cause for the ensuing search.

The detention of the vessel by the Coast Guard could not be justified on the basis that the yacht had entered from a foreign jurisdiction, thus

bringing the detention and search into the category of a border search. The Coast Guard officer did not attempt to justify the stop on the basis of a reasonable certainty that the vessel had entered from a foreign jurisdiction.

(United States v. Tilton (9th Cir. 1976) 534 F.2d 1363.)

Two justifications were offered for the stop by the Coast Guard: (1)

Founded suspicion that the yacht was stolen and that illegal activity was afoot aboard her; and (2) hazardous conditions observed by the Coast Guard caused by the poor rigging and dragging lines. Because we conclude that the Coast Guard was authorized to stop and to detain the vessel for the purpose of calling the crew's attention to the safety hazards created by the defective rigging and the dragging lines, and for the purpose of checking the registration of the vessel, we do not reach and do not decide the question whether the Coast Guard also had justification for the stop based on founded suspicion that the vessel was engaged in illegal activity.

A-8.

Neither owners of vessels nor crews that are aboard vessels plying waters subject to the jurisdiction of the United States have any reasonable expectation of privacy that would exclude temporary detention by the Coast Guard for the limited purposes of checking registration and alerting the crew to hazardous conditions of the type that the Coast Guard observed in this case.

Customs Officer Elkins had independent grounds upon which to participate with the Coast Guard in briefly detaining the vessel. The objective articulable facts which Elkins observed in the presence of the Coast Guard officers supported founded suspicion that the vessel might be carrying contraband. Specific statutory authority exists supporting the customs officer's stopping the vessel. (19 U.S.C. § 1581(a).) The authority thus conferred by statute does not transgress the Fourth Amendment, when, as in this case, the intrusion to be justified is limited to the brief investigatory

A-9.

stop made in this case.^{1/} (Cf.
Brignoni-Ponce v. United States (1975)
422 U.S. 873.)^{2/}

The Coast Guard and the customs officer each had an independent justification for a brief investigatory stop of the vessel. The fact that they cooperated with one another in no way impairs the justification for the stop. Neither agency was using the other as a stalking horse.

AFFIRMED.

1/ Although all the members of the boarding party were armed, the record contains no evidence that the weapons were displayed by the boarding officers in effectuating the stop and temporary detention of the vessel.

2/ We express no opinion on the question whether a customs officer or the Coast Guard can search a vessel in domestic waters, without a warrant and without probable cause, when such boarding and search are conducted at a place other than a border or the functional equivalent of a border. We, thus, do not have to decide whether we will agree or disagree with the approach taken by the Fifth Circuit in United States v. Odom (5th Cir. 1976) 526 F.2d 339; United States v. Hillstrom (5th Cir. 1976) 533 F.2d 209; United States v. One 43-foot Sailing Vessel (5th Cir. 1976) 538 F.2d 694.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

FEB 6 1978

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Clerk, U.S.
COURT OF
APPEALS

v.

STEVE KENT ODNEAL,

No. 76-3537

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 76-3752

v.

JOHN LOUIS RIBANDO,
GEORGE M. CHALIMAN III, and
HAROLD LOUIS BENNETT,

ORDER

Defendant-Appellants.

Before: CHAMBERS and HUFSTEDLER, Circuit
Judges, and WONG.* District Judge

The petition for rehearing filed
December 19, 1977 is DENIED.

* Honorable Dick Yin Wong, United States
District Judge, District of Hawaii,
sitting by designation.

B-1.